

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #34-87:

LYNN BRYANT,)	
COMPLAINANT,)	
vs.)	FINDINGS;
)	CONCLUSIONS;
CITY OF HAMILTON, POLICE)	RECOMMENDED ORDER
DEPARTMENT,)	
DEFENDANT.)	

* * * * *

I. INTRODUCTION

A hearing on the above captioned matter was held on December 3, 1987 in the Justice of the Peace Courtroom of the Ravalli County Courthouse in Hamilton, Montana. Arlyn L. Plowman was the duly appointed hearing examiner for the Board of Personnel Appeals. The Complainant, Lynn Bryant, was present. The Defendant, City of Hamilton Police Department, was represented by Larry Jones. The parties had an opportunity to present evidence and testimony, cross examine witnesses and make arguments. Post hearing briefs were filed and the matter was deemed submitted on February 5, 1987.

II. BACKGROUND

1. On September 24, 1986 the Complainant filed, with the Board of Personnel Appeals, an unfair labor practice charge alleging that:

[On] August 6, 1987 and September 1, 1987 the City Council voted and passed a resolution, cutting their portion of the difference in wages between Workers Compensation pay and full salary for myself and any future employee injured in the line of duty. As it has been the past practice of the City to make up

1 the full difference in wages for an injured
2 employee and currently we are negotiating a
3 contract and this has not been negotiated,
this is a violation of 39-31-401(3).

4 2. The Defendant filed a timely answer to the
5 Complainant's charge on October 5, 1987. In that answer the
6 Defendant denied violating Section 39-31-401(3) MCA and
stated the complainant's charge should be dismissed as
lacking probable cause or merit.

7 3. On October 7, 1987 the Board of Personnel Appeals
8 appointed Joseph Maronick to investigate the complainant's
9 charge. On October 14, 1987 investigator Maronick issued an
investigation report and determination finding probable
merit for the complainant's charge.

10 Subsequently, Arlyn L. Plowman was appointed
11 hearing examiner and the matter was noticed for hearing.

12 III. FINDINGS OF FACT

13 1. The Complainant is a police officer for the City
of Hamilton.

14 2. On or about December 18, 1986 the Complainant
15 suffered a work related injury. He continued to work until
16 on or about February 10, 1987 when he was determined to be
temporarily totally disabled and became eligible for, and
began to receive, Workers Compensation disability benefits.

17 3. Consistent with past policy, the Defendant supple-
18 mented the claimant's Workers Compensation disability
19 benefits by paying to the Complainant, the difference
between Workers Compensation disability benefits and the
complainant's normal salary.

20 4. The Complainant remained on Workers Compensation
21 and continued to receive Workers Compensation disability
benefit supplementation from the Defendant until Septem-
ber 30, 1987.

22 5. During May, 1987, Teamsters Local Union #2 was
23 certified as exclusive collective bargaining representative
24 for certain employees, including the Complainant, of the
Defendant's Police Department.

1 Bargaining between the Defendant and Teamsters
2 Local Union No. 2 began in June, 1987 and was continuing at
3 the time of the hearing in this matter.

4 6. On September 1, 1987 the Hamilton City Council
5 passed and approved Resolution 487 (Joint Exhibit #1) which
6 contained the following provisions:

7 ...it has been the practice of the City
8 Council and the Mayor of the City to provide
9 a program to supplement the Worker's Compen-
10 sation amount paid to an officer injured in
11 performance of duty, but that such practice
12 is no longer deemed advisable or avail-
13 able....

14 ...the program to supplement the Worker's
15 Compensation amount paid to a member of the
16 Hamilton Police Department injured in the
17 performance of duty is hereby eliminated and
18 discontinued as of October 1, 1987.

19 7. The Defendant did not provide the complainant's
20 exclusive collective bargaining representative reasonable
21 notice and an opportunity to negotiate regarding the policy
22 changes contained within Resolution 487.

23 8. The evidence in the record will not support any
24 finding showing discriminatory or retaliatory intent or
25 purpose on the part of the Hamilton City Council in passing
26 and approving Resolution 487.

27 IV. CONCLUSIONS OF LAW

28 1. The Board of Personnel Appeals has jurisdiction in
29 this matter pursuant to Section 39-31-405 et seq., MCA.

30 2. Pursuant to Section 39-31-401(3) MCA, it is unfair
31 labor practice for a public employer to discriminate in
32 regard to hire or tenure of employment or any term or
33 condition of employment in order to encourage or discourage
34 a membership in any labor organization.

35 3. Pursuant to Section 39-31-402(5) MCA, it is an
36 unfair labor practice for a public employer to refuse to
37 bargain collectively in good faith with an exclusive repre-
38 sentative. Good faith bargaining is defined in Section
39 39-31-305 MCA.

40 4. The Montana Supreme Court has approved the prac-
41 tice of the Board of Personnel Appeals in using Federal

1 Court and National Labor Relations Board precedents as
2 guidelines interpreting the Montana Collective Bargaining
3 for Public Employees Act as the State Act is so similar to
4 the Federal Labor Management Relations Act, State ex rel.
5 Board of Personnel Appeals v. District Court, 183 Mont. 223
6 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local #45 v.
7 State ex rel. Board of Personnel Appeals, 195 Mont. 272
8 (1981), 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v.
9 Young (III), 686 P.2d 185 (1984), 119 LRRM 2682.

10 5. Pursuant to Section 39-31-406(5) MCA, the com-
11 plainant's case must be established by a preponderance of
12 the evidence before an unfair labor practice may be found,
13 Board of Trustees v. State ex rel. Board of Personnel
14 Appeals, 103 LRRM 3090, 604 P.2d 770, 185 Mont. 89 (1979);
15 see also Indiana Products v. NLRB, 31 LRRM 2490, 202 F.2d
16 613, CA 7 (1953) and NLRB v. Kaiser Aluminum and Chemical
17 Corporation, 34 LRRM 2412, 217 F.2d 366, CA 9 (1954).

18 6. As a matter of law, Section 39-31-401(3) MCA cited
19 in the complainant's charge does not conform with the
20 evidence nor with Complaint's narrative. A charge alleging a
21 violation of Section 39-31-401(5) would conform with the
22 evidence and better conform with the charge's narrative.

23 Actions before the Board are not subject to
24 technical pleading requirements that govern
25 private lawsuits, NLRB v. IBEW Local 112
(Fischbach/Lord Electric Company), 126 LRRM
2292, CA 9 (1987).

26 The importance of pleadings in adminis-
27 trative proceedings lies in the notice they
28 impart to affected parties of the issues to
29 be litigated at the hearing. Thus the
30 pleadings are to be liberally construed to
31 determine whether the charged parties were
32 given fair notice. Fair notice is given if a
33 charged party having read the pleadings
34 should have been aware of the issues which it
35 had to defend, Billings Board of Trustees v
state ex rel. Board of Personnel Appeals, 103
LRRM 2285, 604 P.2d 773, 185 Mont. 104 (1979)
citations omitted.

36 7. An employer violates its duty to bargain collec-
37 tively in good faith when it institutes a material change in
38 the terms and conditions of employment that are compulsory
39 subjects of bargaining without giving the exclusive

collective bargaining representative both reasonable notice and an opportunity to negotiate about the proposed change. See

Felbro, Inc. (Garment Workers Local 512) v NLRB, 122 LRRM 3133, 795 F.2d 705, CA 9 (1986); City Cab Company of Orlando, Inc., 122 LRRM 2392, 787 F.2d 1475, CA 11 (1986); Teamsters Local 175 (Bell Transit Company) v NLRB, 121 LRRM 3433, 788 F.2d 27, CA DC (1986) and NLRB v Cabonex Coal Company, 110 LRRM 2567, 697 F.2d 200, CA 10 (1982).

8. Pursuant to Section 39-31-305 MCA wages, hours and fringe benefits are compulsory subjects of bargaining. Black's Law Dictionary, Abridged Fifth Edition defines fringe benefits as:

Side non-wage benefits which accompany or are in addition to a person's employment such as paid insurance...sick leave...etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts.

Workers Compensation disability benefit supplementation payments are a compulsory subject of bargaining. See NLRB v Allis-Chalmers Corporation, 102 LRRM 2194, 601 F.2d 870, CA 5 (1979); Southern California Edison, 126 LRRM 1324, 284 NLRB 142 (1987) and NLRB v Laredo Coca Cola Bottling Company, 103 LRRM 2904, 613 F.2d 1338, CA 5 (1980).

9. The Defendant violated its Section 39-31-401 MCA duty to bargain in good faith and engaged in an unfair labor practice pursuant to Section 39-31-401(5) when it unilaterally eliminated a fringe benefit (Workers Compensation supplementation) for certain police officers, including the Complainant.

10. Pursuant to Section 39-31-406 MCA if, upon the preponderance of the evidence taken, the Board is of the opinion that the Defendant named in the complaint has engaged in or is engaging in the unfair labor practice, then the Board shall state its findings and issue an order requiring the Defendant to cease and desist from the unfair labor practice and to take such affirmative action as will effectuate the policies of the Montana Collective Bargaining for Public Employees Act.

11. A remedy of affirmative action cannot be fashioned on the basis of an assumption as to what may have occurred absent the Defendants failure to bargain in good faith, Gulf

1 States Manufacturing, Inc. v NLRB, 114 LRRM, 217 F.2d 1020,
2 CA 5 (1983)).

3 In developing remedies for specific situations there
4 must be an attempt to create a restoration of the situation
5 as nearly as possible, to that which would have obtained but
6 for the unfair labor practice (status quo ante), NLRB v
7 Keystone Consolidated Industries, 107 LRRM 3143, 653 F.2d
8 304, CA 7 (1981); Southwest Forest Industries, 121 LRRM
9 1158, 278 NLRB 31 (1986); St. John's General Hospital v
10 NLRB, 125 LRRM 3463, CA 3 (1987).

11 V. RECOMMENDED ORDER

12 It is hereby ordered that after this order becomes
13 final, the City of Hamilton, Police Department, its offi-
14 cers, agents, and representatives shall:

- 15 1. cease and desist its violation of
16 Section 39-31-401 MCA;
- 17 2. take affirmative action by rescinding
18 Resolution 487 and reinstate its
19 previous policy of supplementing the
20 Workers Compensation disability benefits
21 of a police officer injured in the
22 performance of duty;
- 23 3. cease and desist from instituting any
24 material changes in the terms and
25 conditions of employment, that are
compulsory subjects of collective
bargaining, without giving the affected
employees' exclusive bargaining
representative both reasonable notice
and an opportunity to negotiate about
the proposed change;
4. post in a conspicuous place in the
Hamilton City Police Department copies
of the attached notice marked
"Appendix";
5. notify this Board in writing within
twenty (20) days what steps have been
taken to comply with this order.

1 VI. SPECIAL NOTICE

2 Exceptions to these findings and conclusions and to
3 this recommended order may be filed within 20 days of
4 service thereof. If no exceptions are filed the recommended
5 order shall become the final order of the Board of Personnel
6 Appeals. Address exceptions to the Board of Personnel
7 Appeals, P.O. Box 1728, Helena, Montana 59624.

8 Dated this 16th day of February, 1988.

9 BOARD OF PERSONNEL APPEALS

10 
11 Arthur L. Bowman
12 Hearing Examiner

13 *****

14 CERTIFICATE OF MAILING

15 I, Tara Sheppard, do hereby certify that a true
16 and correct copy of this document was mailed to the follow-
17 ing on the 16th day of February, 1988.

18 Larry W. Jones
19 P.O. Box 7909
20 Missoula, MT 59807-7909

21 Howard F. Recht
22 P.O. Box 149
23 Hamilton, MT 59840-0149

24 Lynn Bryant
25 217 North Fourth Street
Hamilton, MT 59840

City of Hamilton
Police Department
175 South Third Street
Hamilton, MT 59840

A82:0201a

EXHIBIT LIST

Joint Exhibit #1 -- Resolution #487;
Joint Exhibit #2 -- Hamilton City Council Meeting
Minutes of September 1, 1987;
Complainant's Exhibit #1 -- Hamilton City Council Meeting
Minutes of August 4, 1987, a
two-page legal size document;
Defendant's Exhibit #1 -- one-page letter size document,
Workers Compensation information
on Lynn Bryant

A P P E N D I X

In accordance with the order of the Board of Personnel Appeals and to effectuate the policies of Title 39, Chapter 312, Montana Codes Annotated, the City of Hamilton acting through its officers, agents, and representatives, does hereby notify employees of the City of Hamilton Police Department that:

The City of Hamilton will cease and desist its violation of Section 39-31-401, will rescind Resolution Number 487, will reinstate its previous policy of supplementing Workers Compensation disability benefits for police officers injured in the performance of duty, and institute no material change in the terms and conditions of employment that are compulsory subjects of bargaining without giving the exclusive bargaining representative reasonable notice and an opportunity to negotiate about the proposed change.

CITY OF HAMILTON

By: James Whitlock, Mayor

Posted and dated this _____ day of _____ 1988

This notice shall remain posted for a period of sixty (60) consecutive days from the date of posting and shall not be altered, defaced or covered.

Questions about this notice or compliance therewith may be directed to the Board of Personnel Appeals, P.O.Box 1728, Helena, Montana 59624-1728, telephone 444-3022.